No 87-1127

IN THE

Supreme Court of the United States

OCTOBER TERM, 1987

STANISLAW KONARSKI, M.D.,

Petitioner,

against

NEW YORK MEDICAL COLLEGE, INC., KARL P. ADLER, M.D., PHILIP HENIG, M.D., and KURT ALTMAN, M.D.,

Respondents.

ON WRIT OF CERTIORARI TO THE NEW YORK SUPREME COURT APPELLATE DIVISION, FIRST DEPARTMENT

PETITIONER'S REPLY BRIEF

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February 23, 1988

9 pp

TABLE OF AUTHORITIES

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PETITIONER'S REPLY BRIEF

In their Brief in Opposition, Respondents attempt to show that Burton v. Wilmington Parking Authority, 365 U.S. 715 (1961), has been limited by three later decisions of this Court: Jackson v. Metropolitan Edison Co., 419 U.S. 345 (1974); Rendell-Baker v. Kohn, 457 U.S. 830 (1982); and

Blum v. Yaretsky, 457 U.S. 991 (1982). These later cases do not limit Burton: they deal with a different situation. Burton dealt with a public restaurant on public property. The later cases concerned private activities on private property.

Interestingly, Respondents make no mention of this Court's most recent case dealing with state action: San Francisco Arts and Athletics, Inc. v. United States Olympic Committee, 107 S. Ct. 2971 (1987), but instead resorted to a gaggle of lower court opinions, some even unreported. In the Olympic Committee case, there was a 5 to 4 division, the majority concluding that there was no state (i. e., Federal) action, while the dissenters considerd that there was. Four Justices thought that, under Burton, Federal action was present. Both the majority and the dissenting opinions (107 S. Ct. at 2984-87, and 2991-93) discussed the post-Burton cases on which Respondents herein rely. The majority did not discuss Burton, while the dissenters relied on it.

In the Olympic Committee case, as in the

others that have followed Burton, the use of public property was not present. Had it been, one senses that one or several of the Justices in the Olympic Committee majority might also have found Burton controlling.

Respondents also rely on certain lower courts' perceptions (Br. in Opp. 11) that symbiotic state action is more easily found where the alleged discrimination is based on race than on sexual orientation. If such a distinction existed, surely the Olympic Committee Court would not have passed it over in silence.

Respondents also state, inaccurately, that "Petitioner asserts that the test of minimal scrutiny, the rational basis test, governs his termination" (Br. in Opp. 13, misquoting, in n. 11, Petitioner's statement (Pet. 23) by leaving out the word "only"). A close reading of Petitioner's statement (Pet. 23) shows that Petitioner was not proposing a standard of scrutiny, but merely remarking that even the minimal one, if applied to discrimination against heterosexuals, would result in unconstitutionality. It is likely that a higher standard of scrutiny will be found to be appropriate.

Respondents' further statement that Petitioner's argument "is a complete non sequitur: The Fourteenth Amendment has traditionally protected disadvantaged minorities" (Br. in Opp. 13 n. 11) both ignores the fact that some equal protection claims by members of majorities have been upheld and the further fact that, by the time of Petitioner's discharge, according to his claim, power in his department had shifted into the hands of a homosexual clique, so that it was he, Petitioner, as a heterosexual, who was disadvantaged.

Since the Petition was docketed, there has been another decision on the question whether homosexuals constitute a suspect or quasi-suspect class for equal protection component purposes: Watkins v. U.S. Army, No. 85-4006 (D.C. No. CV 81-1065R), 9th Cir., Feb. 10, 1988, slip op. at pp. 1773-1841 (2:1). That distinguished court divided on this question. One may well wonder, however, whether service in the military or in the intelligence service does not introduce a factor which might point the balance differently from what would be appropriate in a case (as at bar) of civilian professional em-

ployment.

Respondents complain (Br. in Opp. 6) that, though they themselves "submitted into the record" the affiliation agreement, Petitioner should not now be allowed to rely on § 5.07 thereof (the clause that prohibits discrimination based on sexual orientation). It scarcely lies in Respondents' mouths to try to exorcise a text that they invited the courts and their adversaries to examine. The case which they cite as authority for their contention that § 5.07 "should not now be considered" -- Butterworth v. Bowen, 796 F. 2d 1379, 1387 (11th Cir. 1986) (Br. in Opp. 6) -- is the reverse of the case at bar. On the very page they cite, that court states that there reliance was attempted on "evidence that is not part of the record."

Respondents also complain of Petitioner's reliance on "provisions of the N.Y. Unconsolidated Laws" (Br. in Opp. 6), although it was Respondents who brought those very provisions to the attention of the court below. In any case, a statute is entitled to judicial notice.

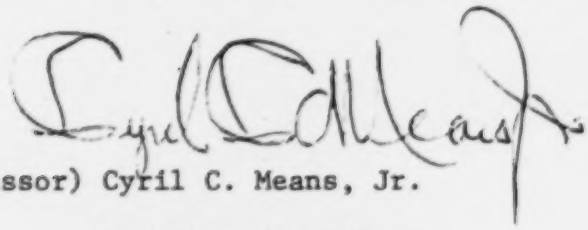
Respondents have also asserted as facts statements which Petitioner is prepared to prove untrue, and, but for the trial court's grant of summary judgment before Petitioner had the opportunity to depose Respondents and other witnesses, he would have proved untrue. Thus, the assertion that Respondent Henig offered Petitioner "a comparable position" (Br. in Opp. 3) is not true: the position was not in fact comparable. And the further assertion that Petitioner rejected another offer, to work full-time in the ambulatory care center (Br. in Opp. 3) is also untrue: no such offer was ever made. Likewise, the assertion that the Medical College "eliminated all part-time positions in the department in which Petitioner worked" (Br. in Opp. 13) is untrue. To Petitioner's knowledge, at least three such part-time positions were not eliminated.

All these disputes as to facts are irrelevant, except as showing that summary judgment should not have been granted, and a trial should have been held to resolve them.

CONCLUSION

For the reasons set forth in the Petition, and for the further reasons set forth in this Reply Brief, it is respectfully submitted that the Petition for a Writ of Certiorari should be granted.

Respectfully submitted,



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